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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/802,868
Filing Date: March 18, 2004
Appellant(s): IIDA, HIROYUKI

Yan Lan
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 1, 2010 appealing from the Office action mailed August 31, 2009.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

JP 08-031128 A	NAGAI et al.	02-1996
JP 2002-166401 A	TSUBOUCHI et al.	06-2002
JP 08-034959 A	NAKANISHI	02-1996

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 2, 4, 6, 7 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A).

As per claim 1, Nagai et al. (JP 08-031128 A) discloses a laminate including a sliding member (1) comprising a slidable substrate (1) and a pressure-sensitive adhesive layer (2) (e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0032]) provided on one side thereof, wherein the slidable substrate (1) is a porous form having has a porosity of 20-70% (e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0027], etc.) and comprises an ultrahigh molecular weight polyethylene (e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0035, 0036], etc.).

As per claim 2, wherein the laminate slidable substrate (1) has a coefficient of friction of 0.2 or lower - see Table 1 (e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0049]).

As per claim 4, wherein the ultrahigh molecular weight polyethylene has a molecular weight of 500,000 or higher (e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0011]).

As per claim 1, however, Nagai et al. (JP 08-031128 A) does not expressly disclose a barrier layer is provided between the slidable substrate (1) and the pressure-sensitive adhesive layer (2).

Such barrier layers provided between porous substrate and adhesive layers, in order to prevent the migration of adhesive into the porous substrates, are well known in the laminate art, however.

As just one example, Tsubouchi (JP 2002-166401 A) discloses a laminate wherein a barrier layer (2) is provided between a porous substrate (1) and an adhesive layer (3) in order to expressly and explicitly "prevent[] an adhesive from infiltration into a surface of a porous substrate." See abstract of Tsubouchi (JP 2002-166401 A).

As per claim 6, wherein the barrier layer (2) comprises a thermoplastic resin (e.g., see, *inter alia*, enclosed English-machine translation of Tsubouchi (JP 2002-166401 A) at paragraph [0031]).

Given the express teachings and motivations, as espoused by Tsubouchi (JP 2002-166401 A), as is also well known and established in the laminate art, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide a barrier layer between the slidable substrate (1) and the pressure-sensitive adhesive layer (2) of Nagai et al. (JP 08-

031128 A), in the express and explicit manner as taught and suggested by Tsubouchi (JP 2002-166401 A).

The rationale is as follows: one of ordinary skill in the art would have been motivated to provide a barrier layer between the slidable substrate (1) and the pressure-sensitive adhesive layer (2) of Nagai et al. (JP 08-031128 A), in the express and explicit manner as taught and suggested by Tsubouchi (JP 2002-166401 A) in order to expressly and explicitly "prevent[] an adhesive from infiltration into a surface of a porous substrate." See abstract of Tsubouchi (JP 2002-166401 A).

The resultant combination of Tsubouchi (JP 2002-166401 A) with Nagai et al. (JP 08-031128 A), would produce Nagai et al. (JP 08-031128 A), as per claim 11, wherein one side of the barrier layer is adjacent to one side of the pressure-sensitive adhesive layer (2) and the other side of the barrier layer is adjacent to one side of the slidable substrate (1) - since Tsubouchi (JP 2002-166401 A) expressly teaches providing the barrier layer (2) between the adhesive layer and the porous substrate to minimize the adhesive from infiltrating the porous substrate.

Additionally, as per claim 7, although Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A), remains silent with respect to wherein the thermoplastic resin has a melt viscosity of 5-500 kPa.s, the Examiner maintains that it would have been obvious to one of ordinary skill in the art at the time of the instant invention to satisfy the claimed range(s) and/or dimension(s), particularly in light of the teachings of Tsubouchi (JP 2002-166401 A) as applied to Nagai et al. (JP 08-031128 A) as a whole, through routine optimization/experimentation. "[W]here the general conditions of a claim are disclosed in the

prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." *In re Aller*, 105 USPQ 233, 235 (CCPA 1955).

Additionally, with respect to the particular claimed ranges, given the teachings and suggestions of Tsubouchi (JP 2002-166401 A) as applied to Nagai et al. (JP 08-031128 A) for providing a thermoplastic resin barrier layer between a porous substrate and an adhesive layer, using the teachings of Tsubouchi (JP 2002-166401 A) as a demonstrative template, it would have been within the skill of one having ordinary skill in the art to routinely modify the particular viscosity when forming the layer of the thermoplastic barrier layer in the course of routine optimization/experimentation and thereby obtain various standard optimized relationships including those set forth in claim 7 as nothing more than a ***predictable variation*** based the on the overarching teachings of Tsubouchi (JP 2002-166401 A), as just a manner in which to simply control the flow application rate of the barrier layer formed of thermoplastic resin.

Additionally, the law is replete with cases in which when the mere difference between the claimed invention and the prior art is some range, variable or other dimensional limitation within the claims, patentability cannot be found.

It furthermore has been held in such a situation, the Applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art range. *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990).

Moreover, the instant disclosure does not set forth evidence ascribing unexpected results due to the claimed dimensions. See *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338 (Fed. Cir.

1984), which held that the dimensional limitations failed to point out a feature which performed and operated any differently from the prior art.

No new or unobvious result is seen to be obtained, given the express teachings and motivations of the applied prior art, and as such, the claimed ranges are seen, absent any unobvious evidence, as nothing more than a ***predictable variation*** based the on such overarching and pertinent teachings of Tsubouchi (JP 2002-166401 A), in light of the general knowledge of an artisan having ordinary skill in the art, with the express rationale provided *supra*. See *KSR Int'l Co. v. Teleflex, Inc.*, No. 04-1350 (U.S. Apr. 30, 2007).

Moreover still, the Supreme Court opined "[w]hen a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a ***predictable variation***, § 103 likely bars its patentably." (Emphasis added) 127 *S. Ct.* 1727, 1740.

The Examiner finds this situation analogous to the optimization of a range or other variable within the claims that flows from the "normal desire of scientists or artisans to improve upon what is already generally known." *In re Peterson*, 315 F.3d 1325, 1330 (Fed. Cir. 2003) (determining where in a disclosed set of percentage ranges the optimum combination of percentages lies is *prima facie* obvious). As noted above, in *In re Aller*, 220 F.2d 454, 456 (C.C.P.A. 1955), it was held that the discovery of an optimum value of a variable in a known process is usually obvious. See also *In re Boesch*, 617 F.2d 272, 276 (C.C.P.A. 1980) ("[D]iscovery of an optimum value of a result effective variable in a known process is ordinarily within the skill of the art."); *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) ("'[I]t is not inventive to discover the optimum or workable ranges by routine experimentation.'" (quoting

Aller, 220 F.2d at 456)); *In re Kulling*, 897 F.2d 1147, 1149 (Fed. Cir. 1990) (finding no clear error in Board of Patent Appeals and Interferences' conclusion that the amount of eluent to be used in a washing sequence was a matter of routine optimization known in the pertinent prior art and therefore obvious).

Claims 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A) as applied to claims 7 and 1, respectively above, and further in view of Nakanishi (JP 08-034959 A).

See the description of Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A), *supra*.

Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A) disclose all the features as set forth in the rejection, *supra*, except for the features set forth in claims 8-10.

Such claimed features, as applied to barrier layers used in laminates are well known. As just one example, Nakanishi (JP 08-034959 A) further teaches providing a laminate in which a barrier layer (3) is provided between an adhesive layer (4) and a functional layer (2) to minimize the underlying adhesive layer (4) from impairing the functional layer (2), wherein, as per claim 9, wherein the barrier layer has a thickness of 0.01-0.5 mm (see abstract of Nakanishi (JP 08-034959 A)), wherein, as per claim 10, wherein the barrier layer (3) comprises polyethylene or polypropylene (e.g., see, *inter alia*, enclosed English-machine translation of Nakanishi (JP 08-034959 A) at paragraph [0007]).

Moreover still, as per claim 8, Nakanishi (JP 08-034959 A) further suggests using a crosslinked component of the thermoplastic resin layer to facilitate adherence between the barrier

layer (3) and the functional layer (2) (e.g., see, *inter alia*, enclosed English-machine translation of Nakanishi (JP 08-034959 A) at paragraphs [0004] and [0007]).

Given the express teachings and motivations, as espoused by Nakanishi (JP 08-034959 A), it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the features set forth in claims 8-10, to the laminate combination of Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A), as exemplified and suggested by Nakanishi (JP 08-034959 A).

The rationale is as follows: one of ordinary skill in the art would have been motivated to provide the features set forth in claims 8-10, to the laminate combination of Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A), as exemplified and suggested by Nakanishi (JP 08-034959 A) in order to provide a well known barrier layer between the functional substrate and the adhesive, to minimize infiltration of the adhesive into the functional layer, while also promoting sufficient adherence between the barrier layers the layers of the laminate.

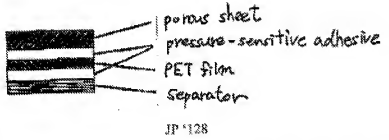
(10) Response to Argument

The Appellants allege at pages 9-10 of the Brief filed on April 1, 2010:

> Appellants disagree with the Examiner's characterization of JP '128. JP '128 does not only fail to disclose the claimed barrier layer, the construction of the member for optical disk protection of JP '128 is clearly different from the claimed sliding member of the present application.
>
> JP' 128 is directed to a method of forming an optical disk unit which does not generate errors at the time of writing and reading by reducing the friction between an optical disc and the cartridge case to suppress the generation of worn powder and capturing the worn powder that is generated. See JP '128, paragraph [0001], English machine translation. A member for protecting the optical disc is obtained by sticking the porous

> sheet on one surface and a separator on the other surface to form a double coated tacky adhesive tape and blacking the tape to an annular shape. See Abstract.

The Appellants then present a depiction of Nagai et al.'s (JP 08-031128 A) description of an example of an embodiment. The Examiner agrees with the Appellants that the Appellants' drawing at page 10 of the Brief, reproduced by the Examiner, *infra*, is an accurate depiction of the disclosure in paragraphs [0038-0039] of the English-machine translation of Nagai et al. (JP 08-031128 A).



JP '128

Appellants' depiction of the description at paragraphs [0038-0039] of Nagai et al. ('128), as reproduced from Appellants' Brief, page 10

In the opinion of the Appellants, such a laminate structure of Nagai et al. (JP 08-031128 A) as illustrated by the Appellants, and described at paragraphs [038-0039] is "different from the claimed sliding member of the present application." Appellants' Brief at page 10, last line.

The Examiner maintains, that although the *disclosure* of Appellants' laminate may be structured differently (perhaps because a double-sided pressure-sensitive adhesive (PSA) is used, which includes an intervening PET layer), the *claimed invention* certainly does not preclude the use of a *double*-sided PSA (as opposed to a single-sided PSA film) with a PET backing; that is, as noted in the rejection of the *claimed* invention, Nagai et al. (JP 08-031128 A) discloses a

laminate including a sliding member (1) comprising a slidable substrate (1 or the **porous sheet** as illustrated in Appellants' depiction of the description of paragraphs [038-0039] of Nagai et al. (JP 08-031128 A), *supra*) and a pressure-sensitive adhesive layer (2 - e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0032], and corresponding to the double-sided **pressure-sensitive adhesive layer** with its intervening backing layer of **PET film**) provided on one side thereof, wherein the slidable substrate (1) is a porous form having has a porosity of 20-70% (e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0027], etc.) and comprises an ultrahigh molecular weight polyethylene (e.g., see, *inter alia*, enclosed English-machine translation of Nagai et al. (JP 08-031128 A) at paragraph [0035, 0036], etc.).

That Nagai et al. (JP 08-031128 A) uses a double-sided PSA, as opposed to a single-sided PSA, with an intervening PET film and/or a separator layer, is certainly not precluded by the claimed invention, which sets forth a "sliding member *comprising* . . ." Emphasis added.

Additionally, as has been widely held, during patent examination, the pending claims must be "given the broadest reasonable interpretation consistent with the specification." The Appellants always have the opportunity to amend the claims during prosecution and broad interpretation by the Examiner reduces the possibility that the claim, once issued, will be interpreted more broadly than is justified. See *In re Prater*, 162 USPQ 541, 550 - 51 (CCPA 1969).

Furthermore, in patent law, "comprising" is open-ended word and one of enlargement, not of restriction; in contrast, "consisting" is word of restriction and exclusion.

As set forth in *Parmelee Pharmaceutical Company et al. V. Zink*, 163 USPQ 271(CA 8 1961):

> The word "comprising" in the patent law is an open-ended word and one of enlargement and not of restriction. "Claim 17 includes the expression 'loose granules of a natural material of the group comprising wood and grain.' The word 'comprising' does not exclude other materials besides wood and grains." *Ex parte Dotter*, 12 USPQ 382, 383-4. (d) In contrast, the word "consisting" is one of restriction and exclusion.

Similarly, as set forth in *Intermountain Research and Engineering Company, Inc., et al. V. Hercules Incorporated et al.*, 163 USPQ 390 (DC CCalif. 1969):

> Claims which define compositions as "consisting essentially" of named ingredients do not embrace compositions containing solid ingredients which are not expressly set forth in claims and which change character of composition; however, claims, which define compositions by use of "comprising," are open ended and encompass compositions which have ingredients named in claims and also other ingredients.

Thus, the Examiner maintains that Nagai et al. (JP 08-031128 A) clearly discloses all features of claims 1, 2 and 4, except, perhaps, for a barrier layer provided between the slidable substrate (1) and the pressure-sensitive adhesive layer (2).

In fact, it may even be plausibly argued that such a barrier layer is indeed shown by Nagai et al. (JP 08-031128 A), in that the PET film provides a barrier of some protection between the lowermost PSA layer and the porous sheet, as shown in the Appellants' drawing of Nagai et al. (JP 08-031128 A) (reproduced above from the Appellants' Brief); PET is thermoplastic resin, and would prevent at least some of the *lower* layer film of PSA from penetrating into the upper porous sheet.

Nevertheless, however, the Examiner maintains that although the structural laminate of Nagai et al. (JP 08-031128 A) may not, perhaps, explicitly disclosure such a barrier layer for preventing the migration of an adhesive into an underlying porous substrate, such a concept of providing barrier layers between a porous substrate and adhesive layers, in order to prevent the migration of adhesive into the porous substrates, is well known in the laminate art.

As just one example, Tsubouchi (JP 2002-166401 A) discloses a structural laminate wherein a barrier layer (2) (thermoplastic resin) is provided between a porous substrate (1) and an adhesive layer (3) in order to *expressly* and *explicitly* "prevent[] an adhesive from infiltration into a surface of a porous substrate." See abstract of Tsubouchi (JP 2002-166401 A).

Given the express teachings and motivations, as espoused by Tsubouchi (JP 2002-166401 A), as is also well known and established in the laminate art, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide a barrier layer between the slidable substrate (1) and the pressure-sensitive adhesive layer (2) of Nagai et al. (JP 08-031128 A), in the manner as taught and suggested by Tsubouchi (JP 2002-166401 A) in order to expressly and explicitly "prevent[] an adhesive from infiltration into a surface of a porous substrate." See abstract of Tsubouchi (JP 2002-166401 A).

The Appellants allege that the laminate of Tsubouchi et al. (JP 2002-166401) is directed to a laminate including a porous substrate made of a "high surface hardness (e.g., plywood)." See Appellants' Brief at page 11.

The Examiner is certainly not attempting to incorporate the exemplified plywood porous material of Tsubouchi et al. (JP 2002-166401) into the laminate of Nagai et al. (JP 08-031128

A), but merely the teaching and well known advantages in the laminate art of expressly and explicitly providing a barrier layer intervening directly between an adhesive layer and a porous substrate, in order to "prevent[] an adhesive from infiltration into a surface of a porous substrate." See abstract of Tsubouchi (JP 2002-166401 A).

More pertinently, as been widely held in patent law, exemplified by *In re Tanczyn*, 44 CCPA 704, 766, 241 F. 2d 731, 112 USPQ 483, 485, (CCPA 1957) "[i]t has been repeatedly held that a patent should not be granted for an Applicant's discovery of a result which would flow naturally from the teachings of the prior art."

Moreover, the Examiner maintains that the test for obviousness is not whether the features of one reference may be bodily incorporated into the other to produce the claimed subject matter, but simply what the combination of references makes obvious to one of ordinary skill in the art. As has been held in *In re Bozek*, 163 USPQ 545 (CCPA 1969), the test for obviousness is not whether the features of one reference may be bodily incorporated into the other to produce the claimed subject matter, but simply what the combination of references makes obvious to one having ordinary skill in the pertinent art. See also *In re Mapelsden*, 51 CCPA 1123, 329 F.2d 321, 141 USPQ 30 (1964); *In re Henley*, 44 CCPA 701, 239 F.2d 3, 112 USPQ 56 (1956); *In re Richman*, 165 USPQ 509 (CCPA 1970); *In re Van Beckum*, 169 USPQ 47 (CCPA 1971) and also *In re Sneed*, 710 F.2d 1544, 218 USPQ 385 (Fed. Cir. 1983).

The Appellants, at page 11 of the Brief, also state:

> Even if JP '401 may teach a barrier layer provided between a porous substrate and an adhesive in order to prevent the adhesive (in solution form) from infiltration into the pores, such is not a concern with JP '128.

> Specifically, JP ' 128 teaches that the adhesive is applied to the separator and dried, and then the porous sheet is stuck to the pressure sensitive adhesive. Since the adhesive of JP ' 128 is dried prior to being attached to the porous sheet, one of ordinary skill in the art would not be concerned with the adhesive infiltrating the pores of the sheet.

The Examiner maintains that even though Nagai et al. (JP 08-031128 A) may dry the coating liquid applied to both sides of the PET film sheet in order to promote better handling of the adhesive, the PSA layer is still an adhesive material, and certainly must exude a strong tackiness in order to function for its intended purpose; the simple bonding of materials in a structural laminate; as noted, *supra*, Tsubouchi et al. (JP 2002-166401) readily recognizes and appreciates that *adhesives* can indeed seep into a porous substrate, producing deleterious results for the underlying porous substrate. One of ordinary skill (as exemplified by Tsubouchi et al. (JP 2002-166401)) in the art would readily appreciate providing a barrier layer to prevent such a recognized problem in order to simply maintain the advantages of the porous substrate, which in the case of Nagai et al. (JP 08-031128 A), would be to enhance the advantages of providing such a slidable, porous substrate when laminated with an adhesive material, as taught and suggested by the structural laminate of Tsubouchi et al. (JP 2002-166401), without being adversely affected by an adhesive or tacky substance with would mitigate or eliminate the low friction of the porous substrate of Nagai et al. (JP 08-031128 A).

Pertaining to the rejection of claims 8-10 under 35 U.S.C. 103(a) as being unpatentable over Nagai et al. (JP 08-031128 A) in view of Tsubouchi (JP 2002-166401 A) as applied to claims 7 and 1, respectively above, and further in view of Nakanishi (JP 08-034959 A), the Appellants merely allege that "JP '959 is relied upon by the Examiner as asserted disclosing the

claimed material of the barrier layer. It is submitted that JP '959 does not cure the above discussed deficiencies of JP '128 and JP '401."

The Examiner, however, maintains the rejection of the claims, as argued above, and that the rejection of claims 8-10 for the reason set forth in the final rejection, should stand as well, particularly since the Appellants do not argue the merits of the rejections of claims 8-10.

For the foregoing reasons, the Examiner maintains a *prima facie* case of obviousness in view of the reference evidence. Based on the totality of the record, including due consideration of Appellants' arguments, it is the opinion of the Examiner that the preponderance of evidence weighs most heavily in favor of obviousness within the meaning of section 103(a).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/William J. Klimowicz/

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Supervisory Patent Examiner, Art Unit 2627

/wy/
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